

9/26/18

Superior Court
Barnstable, ss

Filed SEP 28 2018

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, S.S.

SUPERIOR COURT
NO. 05-109-01-03

Clerk

COMMONWEALTH

v.

CHRISTOPHER M. McCOWEN

Commonwealth
full response
on or before Dec 24, 2018
Christopher J. McCowen
10/25/18

**MOTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR RECONSIDERATION OF JUROR MISCONDUCT MOTION**

Defendant Christopher M. McCowen, by and through undersigned counsel, hereby moves this Honorable Court to enter an order reconsidering its prior order denying him a new trial based upon juror misconduct. Commonwealth v. Fidler, 377 Mass. 192 (1979), superseded on other grounds by Rule of Professional Conduct 3.5 as discussed in Commonwealth v. Moore, 474 Mass. 541 (2016). Specifically, a day after a deliberating jury found Mr. McCowen guilty of the crimes of First Degree Murder, Rape and Burglary regarding the death of Christa Worthington, several members of the jury contacted Mr. McCowen's prior attorney, Robert A. George, to report impropriety in the deliberation process. Attorney George, on behalf of Mr. McCowen, filed a motion pursuant to Fidler for an examination of all of the jurors and for a new trial based upon improprieties occurring during jury deliberations. Many of the alleged improprieties related to race as an improper extraneous factor in deliberations. One of the deliberating jurors (previously identified as Juror A), however, provided in her sworn affidavit that, "during cigarette breaks," she witnessed deliberating jurors discussing the case with alternate jurors who were in the adjoining jury room.

The Court (Nickerson, J.) granted Mr. McCowen's request for a hearing on the motion and individually questioned each juror including the one remaining alternate juror. The

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remaining alternate juror was an individual known as Robert Lyon. During examination by the Court, the Court specifically asked Mr. Lyon if he participated, in any way, in the deliberation process or if he discussed the case with the deliberating jurors during the deliberation process. Mr. Lyon told the Court, under oath, that he did not participate in the deliberation process or discuss the case with the deliberating jurors. The Court eventually denied Mr. McCowen's new trial motion based on juror misconduct.

Last year, ABC News televised a 20/20 special and a six-part podcast on the Christa Worthington murder and the trial of Christopher McCowen. As part of its production, a reporter interviewed Robert Lyon. Lyon admitted to ABC News that he participated in the deliberation process. He also discussed and described the deliberation process. He spoke as a person who had inside knowledge of what transpired in the jury room. He told ABC that the race of Christopher McCowen played no factor in the jury's decision to find him guilty as charged. He told ABC that they (the jury) based its decision on the DNA evidence and the changing nature of Mr. McCowen's version of events.

Lyon's statements to ABC raise the specter whether he committed perjury when he testified before Judge Nickerson on the jury deliberation issue. More importantly, evidence that deliberating jurors discussed the case with alternate jurors — one of whom actually became a deliberating juror in this case — as alleged by a juror in her affidavit and sworn testimony constitutes an improper extraneous influence upon the sanctity of the deliberation process and requires that Mr. McCowen receive a new trial. Parker v. Gladden, 385 U.S. 363, 364 (1966)(Sixth Amendment and Due Process violation occurs when outside influences infect the jury deliberation process); Fidler, 377 Mass. at 197.

FACTS AND BACKGROUND

On June 14, 2005, a Barnstable Grand Jury returned indictments charging Christopher M. McCowen with First Degree Murder, Rape and Burglary surrounding the death of fashion writer Christa Worthington at her home in Truro in early January of 2002. A jury trial in this matter commenced in Barnstable Superior Court on October 16, 2006 before the Honorable Gary Nickerson, Justice of the Massachusetts Superior Court. On November 13, 2006, the jury reported to the Court that it was hopelessly deadlocked. A day later, the Court removed one of the deliberating jurors for misconduct relating to lack of candor and replaced her with an alternate juror. On November 16, 2006, the jury found Mr. McCowen guilty as charged.

On November 17, 2006, three members of the jury approached Mr. McCowen's attorney, Robert A. George, and relayed to him instances of misconduct in the jury deliberation process. The instances of misconduct revolved around disturbing allegations of racial animus infecting the deliberations. One of the jurors, however, also detailed in an affidavit¹ submitted to the Court that she observed deliberating jurors discussing the case with the alternate jurors in an adjoining room during "cigarette breaks."

On December 12, 2006, Mr. McCowen filed a motion seeking to question the jurors pursuant to Fidler and for a new trial based upon the alleged juror misconduct. After inviting a response from the Commonwealth, the Court decided to allow Mr. McCowen's motion to examine the jurors. In its June 8, 2007 order, the Court noted that Mr. McCowen had made a compelling showing regarding racial animus to warrant a hearing. It found the question of improper influence regarding the alternate jurors less compelling than the racial bias claim but still sufficient to warrant questioning on the issue. On November 27, 2007, the Court held a

¹Mr. McCowen incorporates by reference the previously submitted affidavit of Juror A and relies upon it as a factual basis in support of this motion.

telephone conference with the parties to discuss the protocol for the examination of the jurors. The Court ultimately decided that it would conduct the examination of the jurors individually including the remaining alternate juror but the Court invited the parties to submit proposed questions to the Court.

On January 10 and 11, 2008, the Court conducted a hearing on Mr. McCowen's motion. The Court examined all of the deliberating jurors including the juror excused by the Court for misconduct and it examined the one juror who remained an alternate throughout the deliberation process. The sole remaining alternate juror was an individual known as Robert Lyon. During an examination in court under oath, the Court asked Mr. Lyon whether he participated in the jury deliberation process.

DIRECT EXAMINATION

BY THE COURT:

Q: Good morning, sir, and thank you for your patience and willingness to cooperate in this matter. For the record, please tell us your name?

A: Robert Lyon.

Q: And Mr. Lyon, it's fair to say that you were a juror in the course of this case. However, after the charge, you served as an alternate; is that correct?

A: Yes.

Q: Did you ever go in to deliberate in the jury room?

A: No.

Q: You remained as an alternate throughout the matter?

A: Yes.

Q: At any time from the moment you were selected as an alternate until that verdict was announced, did you discuss your views about the case with your fellow jurors?

A: No.

Q: At any time did you send any message into that jury room about how you felt about the case?

A: No.

Juror A provided contrary testimony.

On April 4, 2008, the Court denied Mr. McCowen's new trial motion based on improper extraneous influences in the deliberation process. In 2017, ABC News aired a six-part pod cast and a 20/20 special entitled *A Killing on the Cape*. The two-hour special and the pod cast episodes examined in detail the murder of Christa Worthington and the trial of Christopher McCowen. ABC reporters interviewed many witnesses in connection with the special including at least two jurors. One of the jurors interviewed was Robert Lyon. During the interview with ABC, Mr. Lyon described the jury deliberation process and admitted that he participated in that process. He told a reporter that race played no part in the jury's decision to find Mr. McCowen guilty. Rather, he said, the DNA and Mr. McCowen's changing story swayed the jury's decision. He spoke as though he had inside knowledge of what transpired as the deliberations occurred. Mr. Lyon's statements and admissions to ABC run contrary to his sworn testimony before Judge Nickerson and buttress the sworn affidavit of Juror A.

ABC news reporters attempted to conduct a follow-up interview with Mr. Lyon months after the 20/20 special had aired in November of 2017. The reporters approached Mr. Lyon at his home on Cape Cod. They asked him whether he had participated in the deliberation process or discussed the case with any of the jurors during the deliberation process. Mr. Lyon did not deny the allegation but refused to give a further interview to the reporters.

ARGUMENT

Robert Lyon's admission that he participated in the jury deliberation process violates Christopher McCowen's rights under the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. The Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights guarantee a criminal defendant a right to a trial by a fair and impartial jury. Parker, 385 U.S. at 364; Irwin v. Dowd, 366 U.S. 717, 722 (1961); Commonwealth v. Tavares, 385 Mass. 140, cert. denied, 457 U.S. 1137 (1982). A violation of the Sixth Amendment and Article 12 guarantee of a fair and impartial jury trial occurs when an improper extraneous influences infects the jury deliberation process. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 865 (2017); Parker, 385 U.S. at 364-365; Mattox v. United States, 146 U.S. 140, 150 (1892); Fidler, 377 Mass. at 197; Woodward v. Leavitt, 107 Mass. 453 (1871).

Examples of extraneous factors potentially influencing a jury's verdict include expressions of racial animus. Pena-Rodriguez, 137 S. Ct. at 869. It also includes instances where a bailiff remarks to juror in the presence of other jury members that "Oh that wicked fellow (the petitioner), he is guilty", Parker, 385 U.S. at 363, and instances where a bailiff read a newspaper to a jury revealing that the defendant had supposedly killed two other people. Mattox, 146 U.S. at 150-151.

As the United States Supreme Court held in Mattox, "[i]t is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence, the separation of the jury in such a way as to expose them to tampering may be reason for a new trial, variously held as absolute; or prima

facie, and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place. Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.” Mattox, 146 U.S. at 149-150 (emphasis added). The Massachusetts Supreme Judicial Court (“SJC”) further clarified that a defendant carries the initial burden of showing by a preponderance of the evidence a jury’s exposure to extraneous information but, once the defendant meets his burden, the burden then “shift[s] to the Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the extraneous matter.” Fidler, 377 Mass. at 200-201 (emphasis added). Moreover, the First Circuit has recently held that courts must automatically reverse a conviction as a structural error not even susceptible to the harmless error analysis once a defendant demonstrates juror bias. United States v. French, - F.3d. -, 2018 WL 4403950, at *6 (1st Cir. Sept. 17, 2018)(“In any event, the decisive point is that we view the presence of a biased juror as **structural error**—that is, *per se* prejudicial and not susceptible to harmlessness analysis”)(emphasis added).

Here, an improper private communication occurred between deliberating jurors and alternate jurors. Shortly after the verdict in 2006, Juror A gave an affidavit stating that she witnessed deliberating jurors discussing the case with the alternate jurors in the adjoining room during a smoking break. The Court deemed Juror A’s affidavit sufficient to warrant a hearing on the issue. When questioned under oath by the Court, the sole remaining alternate juror denied that he participated in the deliberation process or that he discussed the case with any of the deliberating jurors. His statements to ABC News in 2017, however, belie his sworn testimony. Lyon admitted to ABC that he participated in the jury deliberation process. He told ABC News

what factors contributed and did not contribute to the verdict. He described in detail the jury deliberation process suggesting that he was an insider with first-hand knowledge of the jury's thoughts, discussions and ultimate conclusions. His participation in the jury deliberation process violates the Court's direct orders and constitutes an improper third party communication in violation of Mr. McCowen's Sixth Amendment and Article 12 rights to a fair and impartial trial.

The context of the third-party communication is particularly troubling in this instance because Mr. Lyon was not the sole alternate juror in this case. The other alternate juror eventually became a member of the deliberating jury panel after the Court dismissed a juror for misconduct. The prospect of deliberating jurors discussing and receiving input from two alternates – including one who eventually became a member of the deliberating panel – certainly constitutes a serious instance of misconduct warranting a new trial. Indeed, the Court dismissed a previous juror when she was less than candid with the Court. The situation presented here is more than a lack of candor. If Mr. Lyon participated in the jury deliberation process or discussed the case with the deliberating jurors during the trial, then he committed perjury when the Court questioned him in 2008. The possibility that Mr. Lyon lied to the Court in 2008 and actually participated in the deliberation process as conveyed to ABC News appears accentuated by the fact that he did not deny his participation when ABC attempted to question him months after his suggestive statements.

Despite his denials before the Court in 2008, Mr. Lyon's statements to ABC News where he described the jury deliberation process actually corroborate the affidavit of Juror A who testified that she witnessed the alternate jurors discussing the deliberating process with the deliberating jurors in the adjacent room during a cigarette break. The prospect that Mr. Lyon deceived the Court and acted in derogation of the Court's orders warrants a hearing. The type of

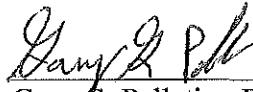
communication admittedly described by Mr. Lyon to ABC constitutes an improper infection of the deliberation process so egregious that it is not susceptible to a harmless error analysis. The Court must grant Mr. McCowen a new trial.

CONCLUSION

For the foregoing reasons, Christopher McCowen asks that the Court grant him a hearing on this motion and, more importantly, Mr. McCowen respectfully asks that the Court allow his motion and grant him a new trial.

Dated: September 28, 2018

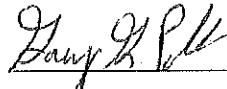
Respectfully submitted,
CHRISTOPHER M. MCCOWEN
By his Attorneys,



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Certificate of Service

I hereby certify that on September 28, 2018, I served a true and correct copy of the foregoing document upon Assistant District Attorney Elizabeth Sweeney at the Cape & Islands District Attorney's Office, 3231 Main Street, Barnstable, Massachusetts 02630 by hand delivery.





9/25/18

Superior Court
Barnstable, ss

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

Filed SEP 28 2018

BARNSTABLE, ss.

SUPERIOR COURT *[Signature]*
CRIMINAL DIVISION Clerk

COMMONWEALTH OF)
MASSACHUSETTS,)
v.) No.: 0572CR0109
CHRISTOPHER MCCOWEN,)
MOVANT.)

AFFIDAVIT

GARY G. PELLETIER, being duly sworn, deposes and says the following is true and correct to the best of his knowledge and belief:

- (1) I am over the age of 18;
- (2) I am an attorney license to practice law in the Commonwealth of Massachusetts and I represent Christopher M. McCowen, who is the defendant in the above captioned action;
- (3) I base this affidavit upon personal knowledge and/or conversations with reporters and producers from ABC News;
- (4) In 2008, this Court (Nickerson, J.) conducted a hearing into potential juror misconduct and bias in connection with Mr. McCowen's trial in 2006;
- (5) As part of the motion, one of the Jurors (Juror A) had submitted an affidavit detailing how she saw the alternate jurors discussing the case with the deliberating jurors during cigarette breaks in the room adjacent to the jury room;
- (6) During the hearing, the Court questioned the alternate jurors;

(7) One of the alternate jurors, Robert Lyon, testified that he did not participate in the deliberation process and did not discuss the case with the deliberating jurors during the deliberation process;

(8) In 2017, ABC News, Inc. ran a television special on this case on 20/20 and conducted a six-part pod cast;

(9) During the podcast and the television special, Juror Robert Lyon described the deliberation process and he explicitly told ABC News that he participated in the deliberation process;

(10) When contacted by ABC News at his home, Mr. Lyon refused to speak further with ABC News but did not deny that he participated in the deliberation process;

(11) Mr. Lyon's statements to ABC News corroborate Juror A's affidavit reveal that he committed perjury when he testified before this Court in 2008;

(12) Accordingly, I request a hearing on the accompany motion and ask the Court to grant Mr. McCowen a new trial.

SIGNED THIS 28th DAY OF SEPTEMBER 2018 UNDER THE PAINS AND PENALTIES OF PERJURY



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CERTIFICATE OF SERVICE

I, Gary G. Pelletier, hereby certify that I served a copy of the foregoing Affidavit by hand delivery upon Assistant District Attorney Elizabeth Sweeney at the Office of the Cape & Islands District Attorney on this date.

Dated: September 28, 2018

